COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

CASE NO. 2022-P-0899

JANE DOE,
Plaintiff – Appellant

v.

MASSACHUSETTS TRIAL COURT DEPARTMENT,
Defendant - Appellee

APPELLANT'S BRIEF

Appellant's Attorney
Thomas J. Gleason, Esquire
GLEASON LAW OFFICES, P.C.
163 Merrimack Street
Haverhill, MA 01830
(978) 521-4044
B.B.O. #: 547134

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Whether the trial court erred when it granted summary judgment in favor of the defendant based on the immunity provision of the Massachusetts Tort Claims Act ("MTCA") set forth at M.G.L. c. 258, Section 10(j), the so-called public duty exception?

Whether the trial Court erred when it granted summary judgment in favor of the defendant based on the immunity provision of the MTCA set forth at M.G.L. c. 258, Section 10(b), the so-called discretionary function exception?

III.

STATEMENT OF THE CASE

The plaintiff filed her original civil complaint on November 3, 2017, which was impounded on November 21, 2017, with an order that the plaintiff file for the public file a redacted complaint containing no personal information. The plaintiff filed a first amended complaint on December 18, 2017. Between January 26, 2018 and August 27, 2018, the plaintiff filed seven (7) requests for an extension of time for service of process.[1] The plaintiff filed a return of service on September 10, 2018. The plaintiff filed her second amended complaint on December 13, 2018. The defendant filed a motion to dismiss, pursuant to Rule 9A, on March 18, 2019, which was denied on April 24, 2019. The defendant filed an answer on August 8, 2019. The defendant filed a motion for summary judgment, pursuant to Rule 9A, on March 18, 2022, which was allowed on May 24, 2022. The plaintiff filed a notice of appeal on June 16, 2022.

[1] On August 31, 2017, the plaintiff filed her MTCA claim in the United States District Court, District of Massachusetts, alleging pendent jurisdiction with related civil rights claims. Anticipating that her state claim might be dismissed by the federal court, and concerned about the statute of limitations, the plaintiff filed this complaint, but did not immediately serve it. On August 28, 2018, the federal court dismissed the plaintiff's MTCA claim at the pleading stage, not on the merits, but for a matter of form (lack of jurisdiction). After dismissal, the plaintiff served the within complaint on the defendant.

IV.

STATEMENT OF THE FACTS

In or about July 2009, the plaintiff, on various dates, was a detainee being held in custody at the Lawrence District Court in connection with scheduled court appearances for pending criminal charges. On one of these dates, in July 2009, the plaintiff was subjected to incidents of non-consensual sexual contact by Jose F. Martinez ("MARTINEZ"), a court officer employed by the defendant. One of these incidents occurred in an elevator. MARTINEZ touched the plaintiff's buttocks while the plaintiff was handcuffed and shackled. A099, A254-A256. Another incident occurred in a cell. MARTINEZ touched the plaintiff inappropriately and entered her vagina with his penis while the plaintiff was shackled. A099, A256-A258.

Later the same day, the plaintiff was transported to the Strafford County Jail, New Hampshire, where she was held in custody for other pending criminal charges. While being held at the Strafford County Jail in 2009, the plaintiff reported the sexual assaults to representatives of the New Hampshire Department of

Corrections ("NHDOC") and the Strafford County House of Corrections ("SCHOC"). A099-A100, A255.

In or about September and October 2014, the plaintiff, on various dates, was again being held in custody at the Lawrence District Court as a detainee in connection with scheduled court appearances for pending criminal charges. On one of these dates, in September 2014, the plaintiff was again subjected to incidents of non-consensual contact by MARTINEZ. One of these incidents occurred while the plaintiff was in a cell. MARTINEZ slipped his hands through the metal trap door and groped her vagina over her clothing while the plaintiff was shackled. A100, A259-A260. Another incident occurred in a stationary elevator. MARTINEZ kissed the plaintiff, groped her breasts and vagina, entered her vagina with two (2) fingers, exposed his penis and attempted (unsuccessfully) to enter her vaginally with his penis, all while the plaintiff was shackled. Prior to the incident, MARTINEZ had stopped the elevator and removed the plaintiff's handcuffs. After the incident, while in the stationary elevator, MARTINEZ took a photograph or photographs of the plaintiff's vagina with a cellphone. A100, A260-A262. On another one of these

dates, in October 2014, the plaintiff was again subjected to incidents of non-consensual sexual contact by MARTINEZ. These incidents occurred when MARTINEZ removed the plaintiff from her cell, without handcuffs, but still shackled, and brought her beneath a stairway in an unoccupied hallway, which he accessed by passing through a locked employee's only door with a swipe card. MARTINEZ kissed the plaintiff, groped her beneath her clothing, exposed his penis and entered her vaginally with his penis, ejaculating while inside her. Prior to entering her vaginally, MARTINEZ removed one of the plaintiff's legs from the shackles. A100, A264-A265, A255.

The plaintiff was later transported to the New Hampshire State Prison for Women, where she was again held in custody for a parole violation. In 2014, while at the New Hampshire State Prison for Women, the plaintiff reported the sexual assaults, both in 2009 and 2014, to representatives of the NHDOC. A100, A255.

On March 4, 2015, the defendant was arrested at the Lawrence District Court by the Massachusetts State Police for rape and other charges. A399-A425. At trial, MARTINEZ admitted, in part, the October 2014

incident. Specifically, he admitted taking the plaintiff from a cell, bringing her to a locked room beneath a stairway, accessing the room with a swipe card, and engaging in fellatio. A299-A305. MARTINEZ'S DNA, in the form of semen and/or semen fluid, was located on an item of clothing the plaintiff possessed at the time of the October 2014 incident. A369.

In July 2013, the Lawrence Police received a report from an adult female claiming MARTINEZ had groped her buttocks and vagina a month earlier in the Lawrence lockup, and the police notified Paul Manjone, the Assistant Chief Court Officer, of the allegation. A395-A396. Director of Security, Thomas Connolly, was also notified of the allegation. A398. After his arrest, another allegation of misconduct against MARTINEZ surfaced, involving an adult female, and occurring at least a year earlier. A427-A428.

The defendant has promulgated rules, policies and procedures governing court officers, entitled Court Officer Manual, which was in effect at the time of the assaults in 2009 and 2014. A429-A703.

Michael McPherson, Regional Director of Security, was unaware of the federal Prison Rape Elimination Act ("PREA") and federal regulations implementing PREA.

A713. He was Chairman of the Policy Committee Group for both the 2011 and 2014 versions of the Court Officer Manual. A710, A713.He testified that the 2014 version of the Court Officer Manual did not incorporate any of the federal PREA regulations implemented in 2012. A714. He testified that he was uncertain whether there was a PREA coordinator for the region. A714. He testified that he did not know whether there was a posting of a written policy of zero-tolerance relative to PREA in the Lawrence lockup. A714. He testified that if a court officer were to have sexual contact with a detainee, voluntarily or involuntarily, it would violate multiple provisions of the rules, policies and procedures set forth in the Court Officer Manual. A715. He testified that there is video monitoring in the cells and lockup area at the Lawrence District Court. A716. He testified that relative to the 2014 Court Officer Manual, the Policy Committee Group considered instituting a policy requiring the presence of a female court officer when a female detainee was being transferred but decided against it. A716-A717. He testified that he was aware a female detainee had reported to the Lawrence Police that she was groped by

MARTINEZ in June 2013, A718-A719, but that he was unaware whether an incident report had been filed, A719, and that the defendant did not conduct an investigation other than viewing the video. A720. He was uncertain if an incident report was filed relative to the plaintiff's allegations against MARTINEZ or whether the defendant ever investigated. A721.

Jeffrey Morrow, Director of Security since 2013, testified that in 2015 the defendant issued a directive stating that court officers must keep a logbook detailing when an officer of the opposite gender transports within a courthouse a detainee of the opposite sex. A733-A734. He stated that he was dissatisfied with the level of supervision of court officers at the Lawrence Courthouse at the time of the sexual assaults in 2014 because the chief court officer had an office off-site, was only present in the Lawrence Courthouse one (1) or two (2) times per week and was unable to supervise adequately. A735, A742. He testified that the sexual assaults involving the plaintiff resulted from a lack of leadership presence in the Lawrence Courthouse. A735. He testified that after the sexual assaults he instituted an internal investigatory capacity, to include an

internal investigative audit and review evaluation capacity within the Department, consisting of a small unit with one investigator and two chief court officers. A735-A736. He testified that the internal investigatory changes were modeled on PREA. A736. He testified that after the sexual assaults the Department began using a software program (IA Pro) to track the results of internal investigations and any disciplinary results. A736. He testified that after the sexual assaults the Department commenced in-service training relative to PREA. A736. He testified that the Department has not yet created or implemented a PREA policy. A736. He testified that he was unaware of PREA prior to the sexual assaults in 2014. A736-A737. He testified that PREA is applicable to lockups. A737. He has not ordered that PREA notifications be posted in lockups. A737. He testified that the defendant does not have a PREA coordinator. A737. He testified that the internal investigative unit he created has not received PREA training. A737. He testified that there is no written departmental policy relative to providing detainees with methods to report sexual abuse or sexual assault. A737. He testified that there is no

written departmental policy requiring court officers to report detainee allegations of sexual abuse or sexual assault. A738. He testified that there is no written departmental policy relative to PREA compliant investigatory standards of detainee claims of sexual abuse or sexual assault. A738. He testified that there is no written departmental policy mandating sexual abuse incident reviews. A738. He testified that there is no written departmental policy mandating data collection of incidents or accusations of sexual abuse or sexual assaults involving detainees. A738. He testified that there is no written departmental policy mandating audits of investigations relative to sexual abuse or sexual assault involving detainees. A738. He testified that a court officer having sexual contact, consensual or non-consensual, with a detainee would constitute a serious violation of the Court Officer Code of Conduct, subjecting the court officer to potential termination. A738, A740. He testified that he was unaware that an adult female detainee had accused MARTINEZ of sexually assaulting her in the Lawrence lockup in 2013. A740. He testified that the Department did not investigate the plaintiff's 2014 sexual assault accusations. A741-A742. He testified

that the regional director of security can access the video surveillance at the Lawrence lockup in real time from his office. A743.

Paul Manjone, retired in July 2019, testified that he was the Assistant Chief Court Officer for the Lawrence lockup at the time of the 2014 sexual assaults. A750, A752. He testified that he did not receive PREA training during his employment with the Department. A752. He testified that he never received training specific to his position as Assistant Chief Court Officer. A754. He testified that when court officers are issued a copy of the Court Officer Manual they are required to sign a document verifying their receipt of same. A755. He testified that there were cameras in the cells and hallways of the Lawrence lockup and two monitors in a central control room. A757-A758, A759-A760. He testified that it was a court officer's duty to constantly observe detainees in cells, either by video or physically, for their own safety. A758. He testified that there were always at least two (2) court officers in the lockup, one in the central control room observing the video monitors, and one physically monitoring the detainees in the cells. A760. He testified that court officers could stop the

elevator with a key while it was being occupied and he thinks there may have been a silent alarm. A761-A762. He testified that he recalls a detainee accusing MARTINEZ of sexual assault in 2013, but he did not file an incident report and the Department did not investigate. A762.

Thomas Connelly, Director of Security from 2008 to 2013, and Deputy Director of Security from 2013 to date, testified that he was unaware that the Department of Justice had issued regulations relative to PREA in 2012. A773, A775-A776. He testified that when court officers are issued a copy of the Court Officer Manual, they are required to sign a document verifying receipt of same. A776-A777. He testified he was unaware if an incident report had been filed, or an investigation conducted, relative to a detainee accusing MARTINEZ of sexual assault in 2013. A777. He testified that a week prior to his deposition, Michael McPherson told him that there had been an accusation against MARTINEZ in 2009 involving his touching a female detainee inappropriately in an elevator, that it had been investigated by the police, that it was unfounded, that he doesn't recall being notified about it at the time, and that he has no

knowledge of whether the Department investigated it. A778-A780.

Heather Brouillette, Assistant Director of Administration, testified that she spoke to Jeffrey Morrow in 2015 about implementing PREA standards for the Department, and had already sent him a first draft of PREA policies and procedures when she learned about the accusations against MARTINEZ. A787-A788, A789. Prior to speaking to Jeffrey Morrow in 2015 about implementing PREA Standards, she reviewed the existing policies and procedures relative to court officers and lockups and did not see anything specific to PREA and thought revision was needed. A790. She testified that the Department now acknowledges that PREA standards apply to lockups. A790-A791. She testified that other than prohibiting cross-gender searches, the Department has not implemented any other PREA specific standards. A792. She testified that a reason why PREA standards have not been implemented more expeditiously is because there was a dispute within the Department about whether PREA applied to lockups. A793-A794.

Exhibit AA, A798-A824, is a copy of United States Department of Justice, Final Rule, Lockup Standards.

V.

ARGUMENT

A. Legal Standard

In deciding this appeal, the Court must view the evidence *de novo*, in the light most favorable to the non-moving party, the plaintiff, Juliano v. Simpson, 461 Mass. 527 (2012), and determine whether there exist any genuine issues of material fact and, if not, whether the defendant is entitled to judgment as a matter of law. Lynch v. Crawford, 483 Mass. 631 (2019).

B. Public Duty Exception

In the trial court, the plaintiff argued, in part, that the so-called public duty exception did not immunize the defendant because it had allowed MARTINEZ to monitor and move female detainees despite multiple accusations against him of sexual assault and/or sexual misconduct. A049-A058. The plaintiff argued that this was an affirmative act subjecting the defendant to liability based on the overall circumstances of the case. In support of the argument, the plaintiff categorized the many acts and failures to act which created the dangerous conditions which led to the plaintiff's injuries.

- Violation of rules, policies and procedures relative to the monitoring and movement of detainees in the September 2014 elevator incident when MARTINEZ stopped the elevator while transporting the plaintiff. A595-A597, A806-A807.

- Violation of rules, policies and procedures relative to monitoring of detainees in the October 2014 cell incident, which was observable via video monitoring and/or physical observation. A595-A597, A806-A807.

- Violation of rules, policies and procedures relative to reporting, investigating and disciplining MARTINEZ for an accusation of sexual assault involving a female detainee in July 2013. A603-A607, A814-A819.

- Violation of rules, policies and procedures relative to reporting, investigating and disciplining MARTINEZ for an accusation of sexual misconduct involving a female in the Courthouse in early 2014. A603-A607, A814-A819.

- Violation of rules, policies and procedures relative to reporting, investigating and disciplining MARTINEZ for an accusation of sexual assault involving a female detainee in 2009. A603-A607, A814-A819.

- Allowing MARTINEZ to be involved in the monitoring and movement of female detainees despite multiple accusations against him of sexual assault and/or sexual misconduct. A814-A817.

- Decision not to implement PREA standards, policies and procedures,

based on the misconception that PREA does not apply to lockups, A790-A794, said standards, policies and procedures, including, but not limited to, appointment of a PREA coordinator, posting of PREA policies, implementation of PREA specific training, implementation of PREA specific training for investigators, creating methods for detainees to report sexual abuse or assault, implementation of mandatory reporting for MTCD employees, creation of PREA specific investigatory standards, mandating sexual abuse and sexual assault incident reviews, mandating data collection and creation of a data base, and mandatory audits. A798-A824.

- Violation of rules, policies and procedures set forth in the Court Officer Manual relative to monitoring of detainees while in the lockup. A595-A596. Manjone testified that detainees in cells were supposed to be always monitored for safety concerns, either by video observation or physical observation, and that there were always two court officers in the lockup area to accomplish this purpose. A758, A760.

- Violation of rules, policies and procedures set forth in the Court Officer Manual relative to movement of detainees while in the lockup. A595-A597. Detainees must be removed from a cell by two (2) or more court officers wherever possible. The Lockup Standards, promulgated by the United States Department of Justice, require that the defendant ensure adequate staffing to comply with supervision and monitoring requirements. A806-A807.

- Violation of rules, policies and procedures set forth in the Court Officer Manual relative to reporting of

incidents of sexual assault and/or sexual abuse. A603-A607.

- Violation of PREA standards relative to the inadequate supervision of court officers in the Lawrence lockup. A798-A824.

The immunity provision set forth in M.G.L. c. 258, Section 10 (j), provides, in pertinent part, that the Commonwealth shall not incur liability for "…any claim based on an act or failure to act to prevent or diminish the harmful consequence of a condition or situation, including the violent or tortious conduct of a third person, which is not originally caused by the public employer…" Id. The Supreme Judicial Court has interpreted the language to mean that there must be evidence of an affirmative act (not a failure to act) by a public employer that materially contributed to creating the specific condition or situation that resulted in harm caused by a third party. Cormier v. Lynn, 479 Mass. 35 (2018). A public employer, therefore, cannot be held liable for an act or failure to act to prevent harm to the plaintiff unless the condition or situation was originally caused by the public employer. Baptista v. Executive Office of

Health and Human Services, 97 Mass. App. Ct. 110 (2020).

In Baptista, supra, the Court found that placing the plaintiff, who was in protective custody as a result of intoxication, in a jail cell with other arrestees, constituted an affirmative act which contributed to the dangerous condition which led to his injuries and death, thereby subjecting the public employer to liability. Id.

In Devlin v. Commonwealth, 83 Mass. App. Ct. 530 (2013), the Court found the public employer's affirmative act caused the dangerous condition which resulted in the plaintiff being injured by the criminal acts of a third party when it allowed convicted inmates to work in an area where civilly committed individuals were housed and treated. Id. The Court concluded that the public employer's decision was "…not so remote from the injury that it can be considered not to have been an original cause." Id. at 535.

This situation is analogous to both Baptista and Devlin. The defendant was aware that female detainees had made allegations of sexual assault and/or sexual misconduct against MARTINEZ. Despite this knowledge,

the defendant allowed MARTINEZ to be involved in the monitoring and movement of female detainees. This decision was made in the context of a situation where the Lawrence lockup was being poorly supervised, where rules, policies and procedures were being regularly violated or ignored, and where the defendant had neglected to implement any of the provisions required by the federal Prison Rape Elimination Act.

The case of Jane J. v. Commonwealth, 91 Mass. App. Ct. 325 (2017) also involves a similar factual scenario and is instructive. This case involved a sexual assault in a common area at Tewksbury State Hospital which was accessible by both male and female detainees. In finding that the defendant was immune, pursuant to MGL c. 258, Section 10(j), the public duty exception, the Court commented that there was no evidence that allowing the two (2) populations to commingle was dangerous or that the male assailant presented a danger to female detainees. Here, in this case, similar conclusions of fact cannot be reached. The plaintiff has presented evidence that the defendant was aware MARTINEZ presented a specific danger of sexual assault and/or sexual misconduct to both her and other female detainees. The defendant

was also generally aware that its facilities and operations were not in compliance with federally mandated regulations which are specifically designed to eliminate the risk of sexual assault and/or sexual misconduct to detainees like the plaintiff.

Similarly, in Olan v. Bridgewater State Hospital, 98 Mass. App. Ct. 1005 (2020), the plaintiff was physical assaulted and injured by another inmate in the dining hall at the Bridgewater State Hospital. The Court found the defendant immune under the public duty exception, noting that there was no evidence that the plaintiff's assailant had been previously violent or that commingling was likely to result in disturbances between inmates. Here, again, and for the same reasons cited above, a like conclusion of fact is insupportable.

C. Discretionary Function Exception

The immunity provision set forth in M.G.L. c. 258, Section 10(b), which provides, in pertinent part, that the Commonwealth shall not incur liability for "… any claim based upon the exercise or performance or the failure to exercise or perform a discretionary

function or duty on the part of a public employer or public employee…" Id. In deciding whether the discretionary function exception applies to a given situation, the Court must first decide whether the public employer and/or employee had any discretion in the circumstance at issue. Barnett v. City of Lynn, 433 Mass. 662, 664 (2001). If discretion exists, the Court must next determine whether the discretion involved is the type of discretion for which Section 10 (b) provides immunity. Id. The type of discretion to which the immunity applies is "… characterized by the high degree of discretion and judgment involved in weighing alternatives and making choices with respect to public policy and planning." Whitney v. Worcester, 373 Mass. 208, 218 (1977). Discretion not entitled to immunity involves the "… carrying out of previously established policies or plans." Id.

The plaintiff disagrees with the trial court's ruling that implementing PREA is optional for the Commonwealth. PREA ("Prison Rape Elimination Act") is a federal law enacted by Congress on September 4, 2003. See generally 34 USC §§ 30301-30309. Federal regulations implementing the statutory law, specific to lockups, were promulgated by the United States

Department of Justice on May 17, 2012. 28 CFR §§ 115.111 to 115.193. The PREA statute is generally appliable to the several States. For example, PREA by its express terms is applicable to all "prisons" in the United States. 34 USC § 30302. PREA defines "prisons" as "…any confinement facility at a Federal, State or local enforcement agency…" 34 USC § 30309(7).

While it may be technically correct that states are not required by law to implement the national standards created by PREA, it does not accurately resolve the issue of whether the Commonwealth is currently required to abide by PREA. Massachusetts accepts federal grant funds. Because it accepts federal grant funds it is required to comply with PREA. Massachusetts can comply with PREA in one of two ways. It can certify that it is in compliance with PREA to retain federal funding, or it can provide assurance that it will comply with PREA. In the latter circumstance, which Massachusetts chose during the operative years of 2014 and 2015, it must abide by a number of rules, one of which is to provide an explanation of the Commonwealth's "…current degree of implementation of the national standards." 34 USC § 30307 (e)(2)(c)(i) (VI). Additional requirements are

that Massachusetts submit a proposed plan for expenditure of the grant funds and a full accounting of how the funds were used. 34 USC §30307 (e)(2)(c)(ii) & (iii). Significantly, there is a sunset on the selection of assurance provision, which is December 16, 2022, 34 USC § 30307 (e)(2)(d), meaning that a state like Massachusetts, which accepts federal grant funding and submits assurances, must complete full implementation of PREA standards by the end of the year 2022. Id.

Many States have implemented PREA. Gardenhire v. Ohio Department of Rehabilitation and Correction, 2019 WL 5405973, Court of Appeals of Ohio, Koontz v. Hobbs, 2014 Ark. 232 (2014), Tillman v. Pennsylvania Department of Corrections, et al, 2017 WL 2536456, Commonwealth Court of Pennsylvania, Winton v. Pennsylvania Department of Corrections, 263 A. 2nd 1240 (2021), Linell v. Norris, 2009 Ark. 303 (2009), In Re Doe, 2014 WL 2600505, Superior Court of Connecticut, Ingerson v. Pallito, 210 Vt. 341, (2019). At least one State has interpreted PREA as mandating implementation by the States. Malinowski v. New York State on Human Rights, 58 Misc. 3d 926 (2016).

Consequently, the more complete and accurate answer is that Massachusetts, because it receives federal grant funding, is required to comply with PREA standards. In addition, Massachusetts has repeatedly provided official assurances to the federal government that it will do so. Massachusetts, consequently, has no discretion in the matter.

Unfortunately, when it comes to lockups, the evidence is that the MTCD has made little or no progress towards implementing PREA standards. Brouillette testified that she has been attempting to institute PREA standards since 2015. Initially, there was a dispute within MTCD as to whether PREA standards were applicable to lockups, which has since been resolved. Nevertheless, other than prohibiting cross-gender searches, no PREA specific standards have been adopted or implemented by the defendant. Consequently, even if the Court concludes that the Commonwealth maintains some level of discretion relative to compliance with PREA standards, said discretion is not characterized by a high degree of discretion or judgment. Review of the federal regulations, A798-A824, reveals that the PREA national standards are comprehensive. The individual provisions are in and of

themselves quite detailed, and concern virtually every aspect of lockup operations, to include training and education of court officers, supervision and monitoring of detainees, searches of detainees, hiring and promotions of court officers, upgrades to facilities and technologies, evidence gathering, investigations, reporting by detainees and staff, reporting to other confinement facilities, discipline, incident reviews, data collection and audits of standards.

VI.

CONCLUSION

For the reasons and arguments set forth above, the Judgment of the Superior Court must be reversed, and this matter remanded to the Superior Court for further proceedings.

Dated: January 25, 2023 RESPECTFULLY SUBMITTED
FOR THE APPELLANT
BY HER ATTORNEY

/s/Thomas J. Gleason
Thomas J. Gleason, Esquire
GLEASON LAW OFFICES, P.C.
163 Merrimack Street
Haverhill, MA 01830
(978) 521-4044
BBO# 547134

CERTIFICATE OF SERVICE

I, Thomas J. Gleason, Esquire do hereby certify that I have this 25th day of January , 2022 forwarded a copy of the within document by electronic filing to all parties of record.

/s/Thomas J. Gleason
Thomas J. Gleason, Esquire

COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

CASE NO. 2022-P-0899

JANE DOE,
Plaintiff – Appellant

v.

MASSACHUSETTS TRIAL COURT DEPARTMENT,
Defendant - Appellee

RULE 16 STATEMENT

Now comes the Plaintiff-Appellant in the above-entitled matter and certifies that the attached brief is in substantial compliance with the applicable rules of Appellate Procedure. The margins exceed 1.5" per side. The header and Footer exceed 1". The font is Courier New. The brief does not exceed the words/inch limit. All required sections are included, and the appendix is attached. It has been formatted as a searchable PDF and the page numbers are consecutive from the front cover to the final page beginning at number 1. The brief does not exceed the applicable page/word limit of Rule 20 of the Rules of Appellate Procedure. It is approximately 4,708 putting it under the 11,000 word limit, in the countable sections and satisfies the 11,000 word limitation even when every page is included in the calculation.

Dated: January 17, 2023 RESPECTFULLY SUBMITTED
FOR THE APPELLANT
BY HER ATTORNEY

/s/Thomas J. Gleason
Thomas J. Gleason, Esquire
GLEASON LAW OFFICES, P.C.
163 Merrimack Street
Haverhill, MA 01830
(978) 521-4044
BBO# 547134

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SUMMARY JUDGMENT MASS. R. CIV. P. 56	Trial Court of Massachusetts The Superior Court
DOCKET NUMBER 1777CV01686	Thomas H. Driscoll, Jr., Clerk of Courts
CASE NAME Jane Doe vs. Massachusetts Trial Court Department	COURT NAME & ADDRESS Essex County Superior Court - Lawrence 43 Appleton Way Lawrence, MA 01841

JUDGMENT FOR THE FOLLOWING DEFENDANT(S)
Massachusetts Trial Court Department

JUDGMENT AGAINST THE FOLLOWING PLAINTIFF(S)
Doe, Jane

This action came before the Court, Hon. John T Lu, presiding, upon Motion for Summary Judgment of the defendant named above, pursuant to Mass. R. Civ. P. 56. The parties having been heard, and/or the Court having considered the pleadings and submissions, finds there is no genuine issue as to material fact and that the defendant is entitled to a judgment as a matter of law.

It is ORDERED and ADJUDGED:

The court, John T. Lu, Associate Justice of the Superior Court, having ALLOWED Defendant's Motion for Summary Judgment, it is ORDERED and ADJUDGED that Plaintiff Jane Doe's complaint against the Defendant Massachusetts Trial Court, shall be, and hereby is, DISMISSED.

DATE JUDGMENT ENTERED	CLERK OF COURTS/ ASST. CLERK
06/01/2022	X

Date/Time Printed: 06-01-2022 08:34:15

SCV061: 03/2016

COMMONWEALTH OF MASSACHUSETTS

ESSEX, ss.

SUPERIOR COURT
CIVIL ACTION
No. 1777CV01686

JANE DOE

vs.

MASSACHUSETTS TRIAL COURT

MEMORANDUM OF DECISION AND ORDER ON MASSACHUSETTS TRIAL COURT'S MOTION FOR SUMMARY JUDGMENT (PAPER NO. 29)

INTRODUCTION

On December 13, 2018, the plaintiff, Jane Doe ("Doe"), filed the Second Amended Complaint for Damages (the "SAC") (Paper No. 14) against the defendant Massachusetts Trial Court (the "Trial Court"), making one claim of negligence. Doe alleges that, on various dates in 2009 and 2014, while she was held in custody at the Lawrence District Court as a detainee in connection with scheduled court appearances for pending criminal charges, she

was sexually assaulted by Jose Martinez ("Martinez"), a court officer employed by the Trial Court. The Trial Court now seeks judgment as a matter of law, arguing Doe's claim is barred by the immunity provisions set forth in the Massachusetts Tort Claims Act ("MTCA"). For the reasons explained below, the Motion for Summary Judgment (Paper No. 29) will be **ALLOWED**.

THE UNDISPUTED MATERIAL FACTS

For purposes of the pending motion, there is no dispute that Doe was subject to various sexual assaults perpetrated by Martinez.

The July 2009 Elevator Incident

In July 2009, while Doe was in the custody of the Lawrence District Court, Martinez groped her, grabbing her buttocks while she was handcuffed and shackled. The 2009 Elevator Incident lasted for the length of the elevator ride, and no one else was physically present on the elevator during its occurrence. Doe did not tell anyone about the 2009 Elevator Incident on the day that it happened.

The July 2009 Cell Incident

On the same day in July 2009, Martinez sexually assaulted Doe in a holding cell located in the basement of the Lawrence District Court. Without Doe's consent, Martinez touched her inappropriately and entered her vagina with his penis while she was shackled. The 2009 Cell Incident lasted minutes, and no one else was physically present in the cell when it occurred. Doe did not tell anyone about the 2009 Cell Incident on the day that it happened.

The September 2014 Cell Incident

In September 2014, while Doe was again in the custody of the Lawrence District Court, Martinez sexually assaulted her a third time. Without Doe's consent, Martinez slipped his hands through the metal trap in the cell door and groped her vagina through her clothes while she was shackled. The 2014 Cell Incident lasted "a couple of quick minutes," during which Martinez remained standing in front of Doe in an effort to block anyone else from seeing what he was doing. No other court personnel

were physically present when this happened, and Doe did not report it to anyone on that day.

The September 2014 Elevator Incident

Later that same day in September 2014, Martinez again assaulted Doe on the elevator. Martinez stopped the elevator by pushing a button and using a key. Without her consent while she was shackled, he groped her breasts and vagina; entered her vagina with his fingers; exposed his penis; and attempted to penetrate her vaginally with his penis. After the 2014 Elevator Incident, which lasted less than five minutes, Martinez took a photograph(s) of Doe's vagina with a cellphone. No one else was in the elevator during the 2014 Elevator Incident, and Doe did not report it to anyone on that day that it occurred.

The October 2014 Stairway Incident

In October 2014, Doe was once again in the custody of the Lawrence District Court for court appearances related to pending criminal charges. During her detention, Martinez sexually assaulted her again. Martinez removed her handcuffs (but kept her shackled) and brought her to a locked room beneath the

stairway in an unoccupied hallway that he accessed with a swipe card. Without Doe's consent, he kissed her; groped her beneath her clothing; exposed his penis; penetrated her vaginally with his penis; and ejaculated while inside her. Sometime after the 2014 Stairway Incident, Martinez's semen was located on an item of clothing that Doe had in her possession at the time of the Incident. No one else was physically present during the 2014 Stairway Incident, and Doe did not report it on the day that it happened.

Doe Reports the Sexual Assault Incidents

Doe first reported the 2009 Cell Incident and the 2009 Elevator Incident on November 24, 2009. While she was in custody in New Hampshire she told a representative of the New Hampshire Department of Corrections (the "NHDOC") about the assaults perpetrated by Martinez. Doe does not know if the New Hampshire authorities reported the assaults to Massachusetts, and she made no other formal or informal complaints regarding the either 2009 Incident until December 10, 2014.

On December 10, 2014, Doe again reported the 2009 Incidents and, for the first time, the 2014 Incidents to Michelle Edmark, an employee with the NHDOC. The Trial Court did not receive any communications regarding Martinez's assaults until after this report.

The Trial Court's Position

The Trial Court's resources are limited by budgetary considerations. At his deposition, the Regional Director of Security for the Trial Court, Michael McPherson ("McPherson"), testified that, when court officers are working in the control room, "they should be monitoring the videos[,]" but that this is not always possible. According to McPherson, in a high-volume courthouse like the Lawrence District Court, a court officer assigned to the control room may also be responsible for "accept[ing] prisoners, tak[ing] out prisoners, [and] get[ting] prisoners ready to go up to the courtrooms." McPherson testified that the Trial Court "do[es] not have the resources to have a court officer sitting in front of the monitors continuously."

During his deposition, Jeffrey Morrow ("Morrow"), the Director of Security for the Trial Court, testified that, as a matter of policy, the Trial Court does not require that a female court officer be present whenever a female detainee is moved. Morrow acknowledged that this might be preferable, but he also stated that it was not always possible. According to Morrow, the Trial Court "do[es] [not] have th[e] option [of providing a female officer] all the time[,]" and that the availability of the option "depend[s] on the staffing makeup in a particular court or the duties and assignments of the officers at a particular time." For the same reason, the Trial Court does not have a policy that requires that two court officers be present to escort a detainee from place to place.

Doe's Allegations

In the SAC, Doe asserts a single claim for negligence against the Trial Court. In support of this claim, she alleges that the Trial Court: (1) "fail[ed] to implement rules, policies and procedures designed to protect and safeguard female detainees"; (2) fail[ed] to follow rules, policies and procedures designed to protect and

safeguard female detainees"; (3) "fail[ed]" to properly train its agents and/or employees"; (4) "fail[ed] to properly educate its agents and/or employees"; (5) "fail[ed] to monitor the activities of its agents and/or employees while in the lockup area"; (6) "fail[ed] to intervene in the wrongful conduct and activities" of Martinez; and (7) "fail[ed] to investigate and discipline" Martinez.

DISCUSSION

This Court required to determine whether the Trial Court might bear some legal responsibility in connection with the negligence claim Doe now asserts. The Trial Court contends that the answer to this inquiry is "no," because it is entitled to immunity under the MTCA. After review of the applicable case law and the parties' arguments, the court is required to conclude that the Trial Court is correct. In short, the sovereign is immune from civil suit and has not consented, through the Legislature, to the imposition of civil liability for the Trial Court's actions even if the Trial Court's actions were negligent.

"The general rule of law with respect to sovereign immunity is that the Commonwealth or any of its [subdivisions, agencies, or] instrumentalities 'cannot be impleaded in its own courts except with its consent, and, when that consent is granted, it can be impleaded only in the manner and to the extent expressed [by] statute.'" DeRoche v. Massachusetts Comm'n Against Discrimination, 447 Mass. 1, 12 (2006) (internal citation omitted). This rule serves to "protect[] the public treasury [against depletion] from unanticipated money judgments." Todino v. Wellfleet, 448 Mass. 234, 238 (2007), citing New Hampshire Ins. Guar. Ass'n v. Markem Corp., 424 Mass. 344, 351 (1997).

In connection with the MTCA, the Commonwealth's waiver of sovereign immunity is limited. First, the waiver applies only to "injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any public employee while acting within the scope of his office or employment." G. L. c. 258, § 2. Second, there are certain exceptions to which

the waiver of sovereign immunity does not apply, and public employers maintain immunity. See generally, G. L. c. 258, § 10.

Pursuant to G. L. c. 258, § 10 ("Section 10"), the MTCA's waiver of sovereign immunity does not apply to, among other claims: "(b) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function . . ."; "(c) any claim arising out of an intentional tort . . ."; and "(j) any claim based on an act or failure to act to prevent or diminish the harmful consequences of a condition or situation, including the violent or tortious conduct of a third person, which is not originally caused by the public employer . . . ."

Finally, the-above referenced exceptions "operate in the alternative;" thus, even if one provision of Section 10 would permit a claim to be brought, that claim will be barred if another provision of Section 10 applies. See Brum v. Dartmouth, 428 Mass. 684, 697 (1999). Thus, to succeed on its request for summary judgment, the Trial Court need only prove that one provision of Section 10 applies.

Section 10(b):

Doe alleges that the Trial Court was negligent for failing to implement and adhere to policies intended to protect and safeguard female detainees; in particular, policies related to the Prison Rape Elimination Act (the "PREA"). The Trial Court contends this claim fails because it is barred by the discretionary function exception set forth in Section 10(b). The Court is compelled, based on applicable case law, to conclude the Trial Court is entitled to immunity.

Under the MTCA's discretionary function exception, "public employers are not liable for 'any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a public employer or public employee, acting within the scope of his office or employment[.]'" Magliacane v. Gardner, 483 Mass. 842, 859 (2020), quoting G. L. c. 258, § 10(b). This exception "distinguishes between 'discretionary' acts, defined as 'conduct that involves policy

making or planning,' and 'functionary' acts, that is, those actions that simply implement established policy." Id., quoting Harry Stoller & Co. v. Lowell, 412 Mass. 139, 141-142 (1992). And, application of the exception is a question of law for the court. See Alter v. Newton, 35 Mass. App. Ct. 142, 148 (1993).

To determine which governmental functions are discretionary, the court applies a two-step analysis. "First, the court must decide 'whether the governmental actor had any discretion at all as to what course of conduct to follow.'" Id. at 860, quoting Harry Stoller & Co., 412 Mass. at 141. "If the actor's conduct is prescribed by statute, regulation, or other readily ascertainable standard, the government has no discretion, and the exception does not apply." Id., citing Harry Stoller & Co., 412 Mass. at 141. "If the first step does not resolve the issue, '[t]he second and far more difficult step is to determine whether the discretion that the actor had is that kind of discretion for which § 10(b) provides immunity from liability.'" Id., quoting Harry Stoller & Co., 412 Mass. at 141. "Although almost every act involves some degree of discretion, '[t]he discretionary

function exception is narrow, "providing immunity only for discretionary conduct that involves policy making or planning."'" Id., quoting Greenwood v. Easton, 444 Mass. 467, 470 (2005), quoting Harry Stoller & Co., 412 Mass. at 141.

Step One: Did the Trial Court Have Discretion?

With respect to the first step, the court concludes that Doe has failed to identify a specific statute, regulation, or established practice that the Trial Court was required to follow. Doe's claim that the Trial Court was required to follow and implement PREA is misplaced. Rather, based on the record before the court, the Trial Court had discretion about the policies and procedures it implemented to promote detainee safety.

First, as the Trial Court points out, while PREA is binding on the Federal Bureau of Prisons, 34 U.S.C. § 30307(b) ("[t]he national standards referred to in [PREA] . . . shall apply to the Federal Bureau of Prisons"), it is not binding on the states. Instead, states may opt into PREA to avoid a five percent reduction in specified federal grant money. See 77 Fed. Reg.

§ 37106-01 ("PREA does not require State and local facilities to comply with the Department's standards, nor does it enact a mechanism for the Department to direct or enforce such compliance; instead the statute provides certain incentives for such confinement facilities to implement the standards"); see also Watts v. Commonwealth, 468 Mass. 49, 62 (2014) (noting that PREA "limits Federal grant money in support of prison facilities in States that do not meet or work toward national standards promulgated by the Attorney General of the United States for preventing rape in prison"). However, even for states that opt into PREA, instantaneous compliance is not expected. PREA provides a procedure for a state's chief executive officer to certify compliance in order to retain the federal funds at issue. 34 U.S.C. § 30307(e)(2)(i). However, if a state is unable to certify full compliance, the state may still retain the federal funds in question by submitting an assurance that the state intends to achieve full compliance with PREA and will use the funds to do so. 34 U.S.C. § 30307(e)(2)(ii); see also Watts, 468 Mass. at 62 ("[t]he fact that full compliance may not occur instantaneously is

contemplated by . . . [PREA]"). And, during the time period relevant to this matter, Massachusetts did not certify full compliance with PREA; rather, it submitted an assurance that the federal grant funds at issue would be used to achieve compliance. See J.A., Ex. K and L.

Even if Massachusetts had certified full compliance with PREA during the period in question, courts have repeatedly determined that facilities and agencies retain significant discretion in determining how to apply PREA to ensure inmate safety. In support of the Motion for Summary Judgment, the Trial Court has cited to several such cases. See, e.g., West Virginia Regional Jail and Corr. Facility Auth. v. A.B., 766 S.E.29 751, 774 (W. Va. 2014) (plaintiff claimed that WVRJCFA's negligent training and supervision led to her being raped by a prison guard; court found that "neither the PREA, nor the standards promulgated at is discretion, provide respondent with an adequate basis upon which to strip WVRJCFA of its immunity"); Tilga v. United States, No. 2014-00256, 2014 WL 12783121, at *16 (D. N.M. Dec. 5, 2014) (Parker, J.) ("PREA leaves the agency substantial discretion in

applying the PREA and in determining the best measures to combat sexual abuse in a prison setting. Stated differently, the PREA is not the source of specific, mandatory directives . . . ."); Doe v. Unites States, No. 2008-00517, 2011 WL 1637147, at *7-8 (D. Haw. Apr. 29, 2011) (Kurren, J.) (dismissing plaintiff's negligence claim, which arose out of prison employee's sexual assault against her while she was an inmate at federal detention center, under the Federal Tort Claims Act, because "PREA does not direct the manner in which Defendants must fulfill [its] goals . . . [Instead,] [a]gencies and facilities appear to have discretion when making decisions as to staffing, video monitoring, and the like").

Doe has not identified any specific statute, regulation, or established practice that the Trial Court was required to follow to safeguard detainee safety. Because the PREA is an optional regime Massachusetts was not fully compliant with during the relevant time frame; and because, even if it had been fully compliant, PREA affords the agencies and facilities implementing its standards considerable discretion, the court concludes that the

Trial Court's conduct in connection with this matter was discretionary.

Step Two: Was the Trial Court's Discretion the Type for which the Legislature Intended to Provide Immunity?

Under the second step of the discretionary function analysis, the court must determine whether the discretion exercised is the type for which the Legislature intended to provide immunity. The Trial Court contends this question must be answered in the affirmative because the security of its detainees and the training, supervision, and investigations into its court officers involves weighing alternatives and making choices with respect to public policy and planning. The court agrees.

"[T]he determination of [what staffing decisions to make and] what security measures to take to protect persons [within a state agency or department's care or custody] . . . from criminal activity is an integral part of . . . policy making and planning[.]" Wheeler v. Boston Housing Auth., 34 Mass. App. Ct. 36, 40 (1993). Moreover, it is policy making and planning that, "[g]iven the wide range of choices" available and "the necessary constraints imposed . . . by budgetary considerations," is

"characterized by a 'high degree of discretion and judgment[.]'" Id., quoting Whitney v. Worcester, 373 Mass. 208, 218 (1977).

In this case, the Lawrence District Court is a high volume courthouse with limited resources; thus, decisions regarding staffing levels and supervision that impact the security, monitoring, movement, and care of its detainees requires the Trial Court to make judgment calls. The Trial Court claims that it does not have the resources to have a court officer in the control room continuously monitoring the security cameras. Similarly, it claims that it does not have the resources to ensure that, whenever a female detainee is moved, there are two court officers present, or that a female detainee is always moved by a female court officer. In the court's view, these day-to-day security and staffing decisions involve the type of discretionary conduct Section 10(b) is intended to protect against. See Coviello v. Massachusetts May Transp. Auth., 96 Mass. App. Ct. 1108, 2019 WL 5788012, at *3 (Nov. 6, 2019) ("[g]iven the limited resources of the [Trial Court] . . . decisions regarding staffing are an integral part of the [Trial Court's] decision-making,

and it would impact the quality and efficiency of the [Trial Court's] services to impose liability for decisions regarding how to allocate staff across its [courthouses and departments]"). The discretionary function exception set forth in Section 10(b) bars Doe's negligence claim against the Trial Court.

This does not amount to a determination by this Court that the Trial Court's actions as to video monitoring and use of female court officers to transport female detainees were not negligent, as a matter of law. The court's sole responsibility is to determine whether the Trial Court is legally entitled to immunity under Section 10. See Sena v. Commonwealth, 417 Mass. 250, 258 (1994) ("[c]ontinuing judicial criticism of . . . practices not otherwise unlawful, and therefore within the discretion of [Trial Court] officials, would impinge on the . . . domain of the [Trial Court]").

Section 10(j):

In addition to Section 10(b), the Trial Court argues that it is entitled to judgment as a matter of law based on the immunities

provided for under Section 10(c) and 10(j). The court finds the Trial Court's arguments regarding Section 10(c) unconvincing. Section 10(j) does, however, provide the Trial Court with an alternative avenue of obtaining judgment as a matter of law on Doe's negligence claim.

Section 10(j) provides that a public employer shall not be liable with respect to "any claim based on an act or failure to act to prevent or diminish the harmful consequences of a condition or situation, including the violent or tortious conduct of a third person, which is not originally caused by the public employer[.]" G. L. c. 258, § 10(j). The Trial Court argues that it is entitled to immunity under this provision because it is not the original cause of the harm that befell Doe. The court agrees with the Trial Court.

In Brum v. Dartmouth, 428 Mass. 684 (1999), the Supreme Judicial Court ("SJC") discussed Section 10(j) at length. "Under Brum and its progeny, there are two parts to the 'original cause' test where harm is inflicted by a third party. First, there must be 'an affirmative action; a failure to act will not suffice.'" Baptista

v. Bristol County Sheriff's Dept., 100 Mass. App. Ct. 841, 854 (2022), quoting Cormier v. Lynn, 479 Mass. 35, 40 (2018). "Second, '[i]n order for a public employer's affirmative act to be the "original cause" of a "condition or situation" that results in harmful consequences to another from "the violent or tortious conduct of a third person," . . . the act must have materially contributed to creating the specific "condition or situation" that resulted in the harm.'" Id. at 854-855, quoting Kent v. Commonwealth, 437 Mass. 312, 319 (2002). Moreover, as the Trial Court points out, this affirmative act requirement is "strict" and wholly "distinct from a failure to prevent . . . harm." Jane J. v. Commonwealth, 91 Mass. App. Ct. 325, 328 (2017), citing Kent, 437 Mass. at 318. This brings the court to the crux of this matter.

Doe has not identified any original, affirmative act on the part of the Trial Court that caused or materially contributed to Martinez's actions and her subsequent injuries; rather, her real complaint is that the Trial Court failed to prevent Martinez from harming her. In fact, in opposing the Motion for Summary

Judgment, Doe states that her negligence claims is based, not on Martinez's criminal conduct, but the Trial Court's "other acts, and failures to act[.]" Such a claim is barred under Section 10(j).

Jane J. is instructive. There, the SJC concluded that Section 10(j) barred holding the Commonwealth liable for a rape committed in a common recreation room in a locked ward at Tewksbury State Hospital, access to which was permitted to both male and female detainees, because the affirmative act of "merely allowing both men and women access to a common recreation room" was not "an original cause of the plaintiff's rape" and plaintiff's claim 'c[ould] be characterized only as a failure to prevent the assailant from being in a position to attack the plaintiff,' which is insufficient to overcome the immunity that [Section] 10(j) provides." 91 Mass. App. Ct. at 330-331 (internal citation omitted). The same reasoning applies in the current case. While there is no doubt that Martinez's conduct was reprehensible, the various failures to act that Doe alleges in support of her negligence claim against the Trial Court are not actionable under Section 10(j).

CONCLUSION AND ORDER

For the reasons explained above, because the Trial Court is immune under Section 10(b) and 10(j) of the MTCA, its Motion for Summary Judgment (Paper No. 29) is **ALLOWED**.

John T. Lu
Justice of the Superior Court

DATED: May 23, 2022